

SEVENTEENTH ANNUAL PERC/NJSBA PUBLIC SECTOR CONFERENCE

APPEAL BOARD/AGENCY SHOP

March 27, 1997

**Don Horowitz, Counsel
Public Employment Relations Commission Appeal Board**

This handout digests significant 1996 court and administrative agency decisions addressing the rights and obligations of employees who pay representation fees in lieu of dues to an exclusive majority representative of their negotiations unit, pursuant to agency shop or other union security agreements which have been authorized by state and federal labor laws.

The principles governing the validity and administration of these union security arrangements have been forged in litigation which, in the public sector, dates back to the decision of the United States Supreme Court in **Abood v. Detroit Board of Education, 431 U.S. 209 (1977)**. During 1996, federal and state courts continued to issue rulings in public sector agency shop disputes interpreting **Chicago Teachers' Union v. Hudson, 475 U.S. 292 (1986) ("Hudson")** which mandates agency shop rebate procedures and **Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991) ("Lehnert")** governing which union expenses are chargeable to nonmembers. These cases assess whether unions collecting such fees are doing so consistent with the Constitutional rights of fee payers.

In accordance with the leading private sector agency shop case, CWA v. Beck 487 U.S. 735 (1988) ("Beck") decisions issued by the National Labor Relations Board as announced in California Saw and Knife Works, 320 NLRB No. 11, 151 LRRM 1121 (12/20/95), modified 321 NLRB No. 95, 152 LRRM 1241 (1996) apply duty of fair representation, rather than constitutional, principles to agency shop disputes. An issue that has arisen often in recent private sector cases is whether Beck requires modification of contracts containing traditional "union shop" language.

Agency shop cases arising under the Railway Labor Act ("RLA") apply constitutional rather than fair representation principles. Accordingly such decisions are of aid in administering public sector agency shop laws as they apply Lehnert, Hudson and Ellis v. Brotherhood Railway Clerks 466 U.S. 435 (1984) ("Ellis") to cases arising under the RLA.

Public Sector

Lancaster v Air Line Pilots Assoc., 76 F. 3d. 1509 (10th. Cir. 1996)

In an RLA case the Court reverses the district court's grant of summary judgment dismissing the lawsuit of a non-union United Airlines pilot who was discharged for failing to pay a special assessment for a sympathy strike to support striking machinists at another airline. Applying Hudson and Lehnert , the court rules:

1. ALPA's failure to provide the nonmember pilot with a notice adequate to explain the nature and purpose of the sympathy strike assessment excused his failure to raise before an arbitrator a claim that the charge was unconstitutional.

2. The six-month limitations period governing actions for breach of the duty of fair representation applies to the Railway Labor Act, but does not run until an objecting employee receives adequate notice of nature and purpose of special charge and is tolled if, after receiving the notice, the objector pursues non-judicial remedies (i.e. arbitration).
3. Relying on dicta from **Beckett v Air Line Pilots Assoc.**, **59 F.3d 1276 (D.C. Cir. 1995)**, the court holds that an assessment to stage a sympathy strike is not chargeable to nonmembers absent evidence that strike would advance the interests of ALPA. A possible adverse impact on future contract benefits from United was deemed too remote.

The court seemed intrigued by, but did not accept, ALPA's argument that the enforcement of agency shop agreements under the RLA is not "state action" given recent Supreme Court cases defining that term. The court held it was bound to follow prior cases holding that employers and unions who are party to agency shop agreements are "state actors" for purposes of constitutional claims.

Bromley v. Michigan Education Ass'n, **82 F. 3d 686**
(6th Cir. 1996), vac'g & rem'g **843 F. Supp. 1147**
(E.D. Mich. 1994)

Reviewing the district court's application of **Lehnert** , the appeals court holds that the lower court improperly restricted the discovery requests of the nonmember plaintiffs seeking the identity of persons who calculated chargeable portion of the agency shop fee and of documents bearing on those calculations. Rather than decipher an ambiguous aspect of **Lehnert** , it follows another 6th circuit case [**Reese v. Columbus**, **71 F. 3d 619 (6th Cir. 1995)**] to rule that extra-unit litigation costs are

chargeable. It holds "defensive organizing" costs nonchargeable, holding that the district court improperly distinguished **Ellis**.

Prescott v County of El Dorado, 915 F. Supp. 1080
(E.D. CA 1996)

A district court grants a preliminary injunction against the collection of agency shop fees equal to 98 per cent of union dues in a unit of County employees with 570 union members and 114 fee payers. The court found the union's challenge procedure did not comply with **Hudson** because challenges would not be resolved for 15 months after fee deductions began. The court approved the union's pre-deduction notice which identified its expense categories, and showed both its prior year's financial statement, and current year's budget projections. The court allowed the union to rely on a presumption that a local union's percentage of chargeable expenses will be at least as great as that in its state affiliate's budget for the purpose of giving notice of its expenditures to nonmembers. The court also held that the plaintiffs failed to demonstrate that an additional 2 per cent escrow of the fee was inadequate to guard against temporary use of nonmember fees for impermissible purposes.

Illinois Fed of Teachers v IELRB, 278 Ill. App.3d 612,
650 N.E.2d 1092 (Ill App. Ct. 1996)

The court affirms the decision of the Illinois Educational Labor Relations Board which relied on **Ellis** to hold that internal and external organizing expenditures are not chargeable to nonmembers.

Private Sector

National Football League Players' Association v. Pro Football Inc (d/b/a "Washington Redskins"), 79 F. 3d 1215 (D.C. Cir. 1996) mod'g 56 F.3d 1525 (1995), aff'g 857 F. Supp. 71 (D.D.C. 1994)

A case that had been ruled moot has been revived in part to preserve as precedent a lower court opinion in which U.S. District Court Judge Hogan tried to do for professional football what Justice Blackmun tried to do for baseball in **Flood v. Kuhn, 407 U.S. 258 (1972)**. The court holds that it erred in vacating the lower court's decision because mootness was caused by the voluntary act of the union, the losing party below, and federal practice does not require vacation of prior decisions in such circumstances. The event causing mootness was the union's abandonment of its claim for enforcement, beyond the end of the 1993-1994 football season, of an arbitration award requiring non-union players to pay agency shop fees. The federal court had vacated the award, holding that the players worked in Virginia (not the District of Columbia), a right to work state, which made the agency shop agreement unenforceable. The supplemental ruling means that writers of law review articles will be able to refer to an opinion which analogizes the lawsuit to a football game and cites the NLRA, the Steelworkers trilogy, the lyrics of "Hail to the Redskins," Alan (the Horse) Ameche's winning overtime touchdown for the Colts in the 1957 NFL title game and Franco Harris' "immaculate reception" for the 1972 Pittsburgh Steelers against John Madden's Oakland Raiders. Harris played football in the New Jersey public sector at Rancocas Valley Regional High School in Mount Holly.

Beverly Enterprises v. Dist 1199C, 90 F.3d 93, reh. den. 98 F.3d. 730 (3d Cir. 1996)

The appeals court affirms a district court decision dismissing an employer's Section 301 suit which had alleged the union security clause in its agreement with the union conflicted with **CWA v. Beck 487 U.S. 735 (1988)** and was unenforceable. The district court held the employer lacked standing but the appeals court finds that there was no subject matter jurisdiction, and holds that the NLRB has primary jurisdiction over claimed violations of 29 U.S.C.A. §158(a)(3) and district court jurisdiction is limited in such cases to determining whether a collective bargaining agreement was in existence. The court states, "Putting aside the anomaly of an employer attacking the agreement which it itself had negotiated, we hold that a claim that the unions have violated Section 8(a)(3) falls squarely within the primary jurisdiction of the Board."

Nielson v. Machinists Lodge 2569, 94 F.3d 1107 (7th Cir. 1996)

The appeals court holds the union did not violate the National Labor Relations Act when it failed to modify the language of its union security clause to reflect that the amount of the fee would be reduced for those who wished to exercise their rights under **Beck**. The court also holds that conspicuous publication of a **Beck** notice in the union's magazine, which was sent to nonmembers including the plaintiff was adequate compliance with the NLRB's decision in **California Saw and Knife Works, 320 NLRB No. 11, 151 LRRM 1121 (12/20/95)**. It also held that a one-month window period was a sufficient amount of time for a nonmember to register and object to the

fee. Finally, it held that the NLRB's jurisdiction over unfair labor practice charges precluded federal court jurisdiction over an action to declare that a union security clause of a labor contract was facially invalid and void. This case differs from **Beverly Enterprises** as the action was brought by an employee and not by the employer and it is arguably in conflict with **Bloom v. NLRB**, 30 F.3d 1001 (8th Cir. 1994) ruling on a similar issue.

Notes